

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

HANNAH FREDRICKSON, ASHLEY KRENING,)
and MAURIALEE BRACKE,)

Plaintiffs,)

vs.)

STARBUCKS CORPORATION,)
a Washington corporation,)

Defendant.)

No. 03:13-cv-00029-HU

**FINDINGS & RECOMMENDATION
ON MOTION FOR ATTORNEYS' FEES**

Jon M. Egan
Jon M. Egan, P.C.
240 Sixth Street
Lake Oswego, OR 97034-2931

Attorney for Plaintiffs

Carol J. Bernick
Derek D. Green
Christopher F. McCracken
Davis Wright Tremaine LLP
1300 SW Fifth Avenue, Suite 2400
Portland, OR 97201-5610

Daniel L. Nash
Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Avenue, NW
Washington, DC 20036

Gregory W. Knopp
Akin Gump Strauss Hauer & Feld LLP
2029 Century Park East, Suite 2400
Los Angeles, CA 90067

Attorneys for Defendant

1 - FINDINGS & RECOMMENDATION

1 HUBEL, United States Magistrate Judge:

2 This matter is before the court on the defendant Starbucks
3 Corporation's motion for attorneys' fees (Dkt. #57). The plain-
4 tiffs in this case originally filed suit in Multnomah County
5 District Court. They sued on behalf of all Starbucks employees in
6 Oregon, seeking to recover under various legal theories for Star-
7 bucks's withholding of payroll taxes on "estimated tips" of 50
8 cents per hour for each employee. After removal to this court,
9 Starbucks filed a comprehensive motion to dismiss, and the
10 plaintiffs filed a motion to remand the case to state court. In
11 detailed findings and recommendations, I recommended Starbucks's
12 motion to dismiss be granted, and the plaintiffs' motion to remand
13 be denied, on the basis that all of the plaintiffs' claims were
14 precluded as a matter of law. Dkt. #46. Judge Malcolm Marsh
15 agreed with my analysis, and also found additional bases for this
16 court's jurisdiction. Dkt. #51. The case was dismissed on
17 October 29, 2013. *Id.* The plaintiffs' appeal is pending in the
18 Ninth Circuit Court of Appeals.

19 Starbucks has filed a motion for "a portion of" its attorneys'
20 fees, in the amount of "\$125,000, a fraction of the amount it
21 expended in defending this case." Dkt. #58, p.2. The parties
22 agree Starbucks's motion is governed by ORS § 20.075. See *Northon*
23 *v. Rule*, 637 F.3d 937, 938 (9th Cir. 2011) ("State laws awarding
24 attorneys' fees are generally considered to be substantive laws
25 under the *Erie* doctrine and apply to actions pending in federal
26 district court when the fee award is connected to the substance of
27 the case.") (internal quotation marks, citation omitted). The
28 statute sets out a number of factors the court must consider in

determining whether to award attorneys' fees, and in determining the amount of such fees if they are to be awarded. See ORS § 20.075(1) & (2). In addition, the statute mandates that any award of attorneys' fees be "reasonable." ORS § 20.075(4). The court first will address whether an award of attorneys' fees is warranted, considering each of the relevant factors* enumerated in ORS § 20.075(1).

ORS § 20.075(1)(a):

The conduct of the parties in the transactions or occurrences that gave rise to the litigation, including any conduct of a party that was reckless, willful, malicious, in bad faith or illegal.

ORS § 20.075(1)(b):

The objective reasonableness of the claims and defenses asserted by the parties.

Starbucks lumps these two factors together, arguing both of the factors weigh against the plaintiffs because they "acted unreasonably in bringing their claims." Dkt. #58, p. 4. Starbucks argues the plaintiffs and their attorney were aware, prior to filing suit, that their claims constituted tax refund claims and were preempted by federal law. *Id.*

As the plaintiffs correctly point out, the first factor, in subsection (1)(a), does not address the parties' conduct in the litigation; rather, it addresses the parties' conduct that gave rise to the litigation. In this case, the conduct giving rise to

*ORS § 20.075(1)(g), requiring the court to consider any amount "awarded as a prevailing party fee under ORS 20.190," is not relevant to this action. ORS § 20.190(6)(a) precludes a prevailing party fee in class action cases.

1 the litigation was Starbucks's decision to begin estimating tips of
2 50 cents per hour for each employee. There is no evidence that the
3 plaintiffs, or Starbucks, acted recklessly, willfully, maliciously,
4 in bad faith, or illegally, "in the transactions or occurrences
5 giving rise to the litigation." The court finds the first factor
6 does not favor either party on the issue of attorneys' fees.

7 With regard to the second factor, the reasonableness of the
8 parties' respective claims and defenses, the plaintiffs argue the
9 court should exercise its discretion and not award Starbucks any
10 fees because the plaintiffs' claims, though unsuccessful, were
11 based on a reasonable legal interpretation, and the plaintiffs did
12 not act unreasonably in bringing their claims.

13 As noted above, Starbucks disagrees. According to Starbucks,
14 it provided the plaintiffs with most of the law it cited in its
15 motion papers, which ultimately led the court to conclude all of
16 the plaintiffs' claims were preempted by federal law. The
17 plaintiffs argue this is irrelevant, claiming defense attorneys
18 nearly always try to convince plaintiffs' attorneys that their
19 clients' claims are groundless and no suit should be filed.

20 The court agrees with the plaintiffs on this point. Despite
21 Starbucks's insistence that the plaintiffs' claims were preempted
22 by federal law, the plaintiffs were entitled to pursue their inter-
23 pretation of the law, or to argue for a change in the law. "Even
24 when the law or the facts appear questionable or unfavorable at the
25 outset, a party may have an entirely reasonable ground for bringing
26 suit." *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 22,
27 98 S. Ct. 694, 701, 54 L. Ed. 2d 648 (1978).

1 Further, the mere fact that the plaintiffs did not prevail
2 does not mean their claims were unreasonable or without foundation.
3 See *Christiansburg*, 434 U.S. at 421-22, 98 S. Ct. at 700 (same);
4 *E.E.O.C. v. Bruno's Restaurant*, 13 F.3d 285, 287 (9th Cir. 1993)
5 (citing *Christiansburg*). The court finds the plaintiffs' claims
6 and Starbucks's defenses were objectively reasonable, and the
7 second factor does not favor either party on the issue of attor-
8 neys' fees.

9 **ORS § 20.075(a)(c) :**

10 The extent to which an award of an attorney
11 fee in the case would deter others from
12 asserting good faith claims or defenses in
similar cases.

13 **ORS § 20.075(a)(d) :**

14 The extent to which an award of an attorney
15 fee in the case would deter others from
asserting meritless claims and defenses.

16 The plaintiffs argue deterrence of good-faith claims is the
17 most important factor for the court's consideration. They rely
18 heavily on my analysis in *Gardner v. Martin*, 2006 WL 2711777
19 (D. Or. Sept. 19, 2006) (Brown, J, adopting my Findings and
20 Recommendation on a motion for attorneys' fees). The plaintiffs in
21 *Gardner* owned a small family business in Boring, Oregon. They sold
22 a customer a jet ski that proved to be defective and incapable of
23 repair. The customer was dissatisfied, and contacted the host of
24 a syndicated radio show who sought to help consumers with various
25 problems. The show host made some disparaging comments about the
26 plaintiffs' business, and the plaintiffs brought a tort action
27 against the radio show host, and two national media outlets that
28 distributed the show. Adopting my recommendation, Judge Brown

1 struck the plaintiffs' claims under Oregon's "anti-SLAPP" statute,
2 ORS § 31.150.

3 The defendants moved for attorneys' fees in the amount of
4 \$149,517. I analyzed the relevant statutory factors, and recom-
5 mended an award of fees to the defendants in the total amount of
6 \$27,500. Among other things, I found that awarding fees in the
7 amount requested by the defendants "could result in encouraging
8 tortious behavior by those with far greater financial resources."
9 I further noted:

10 The court must evaluate the relative balance
11 between deterring meritless claims on the one
12 hand and preserving the right to pursue meri-
13 torious claims on the other. While a fee
14 award of some amount may be warranted in a
15 particular case, one that goes too far will
16 invariably deter not only claims without
17 merit, but claims with merit as well, simply
18 because the risk that some court, somewhere,
19 might disagree with the claimant and conclude
20 that the claim lacks merit, is too great given
21 that the plaintiff could be subject to com-
22 plete financial ruin as a result of filing the
23 claim.

24 *Gardner*, 2006 WL 2711777, at *5; see *id.* (noting that in *Card v.*
25 *Pipes*, 2004 WL 1403007 (D. Or. June 22, 2004), Judge Hogan reduced
26 a \$58,712.90 fee request for 268.6 hours of work on an anti-SLAPP
27 motion, finding \$5,000 was a reasonable fee).

28 The plaintiffs also argue that if workers are punished "for
bringing unsuccessful but nonfrivolous cases," the purposes of
Oregon's wage-and-hour statutes will be thwarted. The plaintiffs
note that in cases between an individual and an agency, where the
individual successfully proves the agency erroneously interpreted
a statute, the Oregon Supreme Court has denied motions for
attorneys' fees. See, e.g. *Swarens v. Dep. of Revenue*, 320 Or.

1 669, 674, 890 P.2d 1374, 1377 (1995); accord *Clackamas County*
2 *Assessor v. Village at Main Street Phase II, LLC*, 352 Or. 144, 282
3 P.3d 814 (2012). By implication, at least, the plaintiffs here
4 appear to argue that if an individual cannot recover attorneys'
5 fees from an agency that makes an erroneous, but reasonable,
6 interpretation of a statute, then a defendant similarly should not
7 be awarded attorneys' fees when a plaintiff makes an erroneous, but
8 reasonable, interpretation of the law.

9 The plaintiffs further argue that awarding Starbucks fees will
10 not deter meritless claims, which already are deterred to some ex-
11 tent in wage-and-hour actions due to "the inherent power imbalance
12 in the employee/employer relationship." Dkt. #64, ECF pp. 5-6.
13 According to the plaintiffs, this power disparity is what prompted
14 the Oregon Legislature to enact the fee-shifting statute (ORS
15 § 653.055) in the first place.

16 As expected, Starbucks has an opposing view. Starbucks claims
17 that awarding it attorneys' fees will not deter others from
18 asserting good faith claims in similar cases "because an employee's
19 proper recourse in these circumstances is to file an administrative
20 claim with the Internal Revenue Service - not to sue his or her
21 employer. . . . Awarding attorney's fees, therefore, will simply
22 encourage employees to file their claims in the proper forum."
23 Dkt. #68, ECF pp. 5-6. Starbucks also argues that awarding it
24 attorneys' fees would deter other "potential plaintiffs from haling
25 their employers into court over tax withholdings[.]" *Id.*, ECF
26 p. 6. Among other cases, Starbucks cites *Thomas v. U.S. Bank,*
27 *N.A.*, 2008 WL 974734 (D. Or. Apr. 8, 2008) (Mosman, J), in support
28

1 of its argument that awarding attorneys' fees would have a deter-
2 rent effect on similar claims in the future.

3 In *Thomas*, the plaintiff sued the defendant bank for alleged
4 violations of Oregon's Unlawful Debt Collection Practices Act
5 ("UDCPA"), and Oregon's Unlawful Trade Practices Act, both of which
6 "provide that the court may award reasonable attorney fees to the
7 prevailing party." *Thomas*, 2008 WL 974734, at *1 (emphasis in
8 original). The bank sought attorneys' fees of \$159,455 for work
9 performed "from the beginning of the case, in October 2005, through
10 briefing on the parties' respective motions for summary judgment,
11 in November 2006, because the [plaintiffs'] state law claims were
12 primarily dismissed at summary judgment. *Id.* Judge Mosman found
13 that awarding attorneys' fees to the bank would neither deter
14 future good-faith claims with legal merit, nor "encourage the
15 practice of illegal debt collection. . . ." *Id.*, at *2. He
16 further found "an award of attorney fees . . . would discourage
17 others from asserting meritless claims. . . ." *Id.*

18 *Thomas* is distinguishable from the present case for two
19 reasons. First, in contrast to Judge Mosman's finding that the
20 plaintiffs' claims in *Thomas* were objectively unreasonable, the
21 court in this case has found the plaintiffs' claims were not
22 objectively unreasonable. Second, Judge Mosman also found two
23 other factors listed in the statute supported an award of attor-
24 ney's fees. Regarding "[t]he objective reasonableness of the
25 parties and the diligence of the parties and their attorneys during
26 the proceedings," **ORS § 20.075(1)(e)**, Judge Mosman emphasized that
27 all but one of the plaintiffs' claims "were dismissed at summary
28 judgment, and the remaining UDCPA claim had a stated value of only

1 \$19.75. Ultimately, this claim was dismissed shortly before trial
2 because of its *de minimus* value. The [plaintiffs'] willingness to
3 proceed to trial on this claim indicates a lack of objective
4 reasonableness." *Thomas*, 2008 WL 974734, at *3.

5 Similarly, regarding "[t]he objective reasonableness of the
6 parties and the diligence of the parties in pursuing settlement of
7 the dispute," **ORS § 20.075(1)(f)**, Judge Mosman held it was
8 unreasonable for the plaintiffs to refuse a \$30,000 settlement
9 offer made by U.S. Bank. *Id.*

10 The facts of the present case differ significantly from those
11 in *Thomas*. Here, had the plaintiffs prevailed, their claim would
12 not have been *de minimis*, and they could reasonably argue for
13 change in the law by pursuing their claim. In addition, the record
14 in the present case does not contain evidence that the plaintiffs
15 refused any reasonable settlement offer (or any settlement offer at
16 all) made by Starbucks.

17 The court finds that neither of the factors in subsections (e)
18 and (f) supports an award of attorneys' fees to Starbucks.
19 Further, the court finds that awarding fees to Starbucks could, in
20 fact, deter future meritorious claims. The court has found the
21 plaintiffs' claims in this case were objectively reasonable, and
22 not asserted in bad faith. If an individual employee were ordered
23 to pay attorneys' fees that would result in the employees' finan-
24 cial ruin, it is reasonable to conclude that employees seldom would
25 dare to challenge an employer's actions in court. Starbucks argues
26 the employee would be encouraged to pursue similar claims through
27 the administrative process, but that argument fails when the
28 employee (or the employee's attorney) holds a good faith,

1 reasonable belief that no administrative process would provide an
2 adequate remedy for the perceived wrong.

3 **ORS § 20.075(1)(h):**

4 Such other factors as the court may consider
5 appropriate under the circumstances of the
6 case.

7 The plaintiffs here, like the plaintiffs in *Thomas*, urge the
8 court to consider the parties' relative financial positions as an
9 "other factor" under subsection (h). The plaintiffs note they were
10 Starbucks baristas making minimum wage, and they claim an award of
11 even 10% of the fees Starbucks is seeking would bankrupt them.
12 Dkt. #64, p. 11. In *Thomas*, the plaintiffs urged the court "to
13 consider the fact that they [were] semi-retired senior citizens
14 with a modest income as another factor that [was] appropriate under
15 the circumstances of th[e] case." *Id.* Judge Mosman agreed the
16 parties' relative financial positions was, indeed, a relevant
17 factor, but not a strong enough one "to outweigh all of the other
18 factors in favor of awarding attorney fees to U.S. Bank." *Id.*
19 Nevertheless, he took the parties' relative financial positions
20 into account in determining the amount of fees to award. *Id.*

21 As I noted in *Gardner*, a fee award that goes too far likely
22 would have a chilling effect on meritorious claims if a plaintiff
23 could be subject to complete financial ruin as a result of filing
24 the claim. The court must strike some balance between all of the
25 competing interests, not only in determining the *amount* of attor-
26 neys' fees to award, but in determining, in the first instance,
27 whether fees should be awarded at all. Here, the court finds that
28 none of the factors enumerated in the statute supports an award of
attorneys' fees to Starbucks. On the other hand, both the

1 deterrence of meritorious claims, and the protection of an
2 individual's access to the courts by preventing his/her financial
3 ruin if the claims are unsuccessful, weigh heavily against awarding
4 fees. Such a decision is not without precedent in this court.

5 In *Bobadilla-German v. Bear Creek Orchards, Inc.*, 2010 WL
6 1815796 (D. Or. May 5, 2010) (Panner, J), the court denied fees to
7 a prevailing defendant employer. The plaintiffs were agricultural
8 workers who sued the defendant both individually and on a class
9 basis for several alleged violations of the Migrant and Seasonal
10 Agricultural Workers Protection Act, 29 U.S.C. § 1801 *et seq.* One
11 of the plaintiffs' class claims alleged violations of Oregon's
12 minimum wage laws. The court found the claim "was novel as Oregon
13 courts had yet to rule on a similar claim. Although the court
14 ended up agreeing with defendant's interpretation of the statute,
15 plaintiffs' minimum wage claim was an objectively reasonable claim
16 brought in good faith." *Id.*, at *2. The court denied the
17 defendant's motion for attorney's fees relating to this claim,
18 holding "that an award of attorney fees to defendant here would
19 have a chilling effect on good faith claims in similar cases. . . .
20 To award defendant attorney fees here would certainly deter future
21 good faith minimum wage claims as only plaintiffs with the most
22 airtight cases would assert their rights under [Oregon's minimum
23 wage laws]." *Id.* In the present case, the court finds awarding
24 Starbucks attorneys' fees would have a similar "chilling effect on
25 good faith claims."

26 In conclusion, after considering all of the relevant factors
27 in ORS § 20.075(1), the undersigned recommends Starbucks's motion
28 for attorneys fees be **denied**. As a result, the court does not need

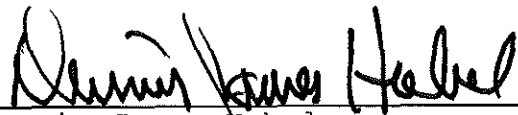
1 to address the factors in subsection (2) of the statute, which are
2 relevant to the *amount* of fees to be awarded when the court decides
3 a fee award is warranted.

4
5 **SCHEDULING ORDER**

6 These Findings and Recommendations will be referred to a
7 district judge. Objections, if any, are due by **August 25, 2014**. If
8 no objections are filed, then the Findings and Recommendations will
9 go under advisement on that date. If objections are filed, then
10 any response is due by **September 11, 2014**. By the earlier of the
11 response due date or the date a response is filed, the Findings and
12 Recommendations will go under advisement.

13 IT IS SO ORDERED.

14 Dated this 7th day of August, 2014.

15
16 
17 _____
18 Dennis James Nubel
19 Unites States Magistrate Judge
20
21
22
23
24
25
26
27
28